NO. A09-935

State of Minnesota
In Supreme Court

SCI Minnesota Funeral Services, Inc.,
Corinthian Enterprises, LLC,

Appellants,

v.

Washburn-McReavy Funeral Corporation,
Washburn-McReavy Cemetery Association,

Respondents.

APPELLANTS' BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

I. Whether *de novo* review is required both because this appeal emanates from a grant of from summary judgment and because the district court declined to exercise its discretion, erroneously believing equitable relief was not available as a matter of law?

Correct answer is yes.
Despite that the appeal was taken from a summary judgment and that the district court held that equitable relief was unavailable as a matter of law, each context independently requiring a de-novo standard of review, the court of appeals incorrectly applied more deferential standards.

List of apposite law:

- *FinAg, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579, 584 (Minn. 2006)
- *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990)
- *Nguyen v. State Farm Mut. Auto Ins. Co.*, 558 N.W.2d 487, 490-91 (Minn. 1997)
- *In re Estate of Slingerland*, 196 Minn. 354, 357, 265 N.W. 21, 23 (1936)

II. Whether Minnesota law permits reformation based on mutual mistake without regard to the method of conveying the bargained-for object of the sales transactions?

Correct answer is yes.
The dissenting court of appeals' judge correctly stated that reformation should be had and judgment should be entered in Appellants' favor; both the district court and the court of appeals' majority misapplied a 90-year-old rescission-only decision of this Court in a reformation context and erroneously held no.

List of apposite law:

- *Theisen's, Inc. v. Red Owl Stores, Inc.*, 309 Minn. 60, 65, 243 N.W.2d 145, 148 (1976)
- *Pettyjohn v. Bowler*, 219 Minn. 55, 58, 17 N.W.2d 82, 84 (1944)

- *Haley v. Sharon Twp. Mut. Fire Ins. Co.*, 147 Minn. 190, 193, 179 N.W. 895, 896 (1920)

- *Restatement (Second) of Contracts §§ 155, 157*

III. Whether Minnesota law permits rescission in a stock sale where there was no mutual assent to convey certain property and/or where there was a mutual mistake as to the property being transferred?

Correct answer is yes.
The court of appeals' majority erroneously held no, misapplying this Court's extremely narrow, 90-year-old Costello decision and ruling that if the means of conveyance was stock, rescission may not be had either due to mutual mistake or lack of mutual assent; the dissenting court of appeals judge correctly noted that a court should "look beyond the form of the asset transferred (corporate stock) to the substance of the transfer;" the district court mistakenly never decided the lack-of-mutual-assent issue and incorrectly denied mutual-mistake rescission.

List of apposite law:

- *Winter v. Skoglund*, 404 N.W.2d 786, 793 (Minn. 1987)

- *Gartner v. Eikill*, 319 N.W.2d 397, 399 (Minn. 1982)

- *Hy-Vee Food Stores, Inc. v. Minn. Dep't of Health*, 705 N.W2d 181, 185 (Minn. 2005)

- *Restatement (Second) of Contracts §§ 151, 152, and 157 (incl. cmt. a)*

STATEMENT OF THE CASE

Appellants SCI Minnesota Funeral Services, Inc. ("SCI") and Corinthian Enterprises LLC ("Corinthian") brought suit on or about June 9, 2008 in the District Court for the First Judicial Circuit, Dakota County, against respondents Washburn-McReavy Funeral Corporation and Washburn-McReavy Cemetery Association (collectively "Washburn"). [A1] Appellants sought, *inter alia*, reformation or, in the alternative, rescission of a sale agreement in order to effect the intent of the parties. [*See* Second Amended Complaint, A27] On April 2, 2009, the trial court (Hon. Kathryn D. Messerich) reluctantly granted summary judgment in favor of Respondents. [Addendum 24] On March 16, 2010, the Court of Appeals (Hon. Michelle Larkin and Hon. Wilhelmina Wright) affirmed in a split decision, holding that neither remedy was available as a matter of law in the circumstances of this case. [Addendum 1] Judge Worke dissented, and would have reversed the trial court and remanded for entry of judgment in favor of Appellants. [Addendum 18] On May 26, 2010, this Court granted review. [A310]

STATEMENT OF FACTS

The goal of contract law is to effect the intent of the parties. Yet the court of appeals' majority effectively nullified this core contract principle in this case. It is undisputed that the parties to the sequential sales intended to convey three cemeteries for $1,000,000 and only structured their transactions through the sale of corporate stock, rather an asset sale, in order to allow the buyer to legally operate the three cemeteries as a

for-profit enterprise under Minnesota law. It is furthermore undisputed that none of the parties involved in the negotiating the sales transactions knew about or intended their agreements to cover two additional vacant lots which, unknown to any party, were titled in the name of the corporation whose stock was sold, and which lots by themselves were worth ***twice*** the consideration paid for the functioning cemeteries that were the actual intended object of the bargain. When the mistake was discovered and the buyers refused to quit claim title and return the lots to the original seller, the sellers sought either reformation or, in the alternative, rescission in order to conform the deal to the parties' intent.

Despite that equity exists to effect the parties' true intent, the court of appeals' majority held that neither reformation nor rescission is available, merely because the parties effected their intent through a stock sale, and consequently awarded the ultimate buyers an enormous windfall unintended by any party. Despite the parties' bilateral common mistake and lack of mutual assent relating to a fundamental basis of the transaction, the majority held that the sellers have no ability, regardless of the facts, to recover properties that neither the sellers nor the buyers intended to be the object of the sales. That decision was incorrect and should be reversed. Where, as here, it is undisputed that a contract of sale as consummated does not reflect the parties' intent on a material issue, the requirements of both reformation and rescission are satisfied – regardless of whether the sales were accomplished through a sale of stock.

I. The parties bargained for the sale, purchase, and transfer of the Cemeteries for the sale price of $1,000,000.

As the district court correctly noted, "[t]he essential and material facts of this case are not in dispute." [Addendum 26] SCI owned three functioning cemeteries, Crystal Lake Cemetery, Glen Haven Memorial Garden cemetery, and Dawn Valley Memorial Park Cemetery (collectively the "Cemeteries"). [Addendum 42, Addendum 49/16:1-17-6] SCI owned the Cemeteries through Crystal Lake Cemetery Association ("Crystal Lake"), almost all of whose shares were owned by SCI and which had formal title to the properties. [Addendum 49/16:1-18, A59/17:11-23, A85(f) & (g), A124-125, A138-139, A158-159, A183/20:1-5, A184/26:21-27:11, A218/13:11-14][1] In the deal that was consummated on July 20, 2005, SCI sold the Cemeteries to appellant Corinthian, which on the same day resold them to respondents Washburn. [A185/31:9-16, 221/25:25-26:4]

In April 2005, SCI and Corinthian entered into a "Letter of Intent" that set forth the "basic terms" of the planned sale by SCI and purchase by Corinthian of various specified operating assets of several businesses, including the Cemeteries. [Addendum 22-24] The parties anticipated an asset sale. [A55-56/14:10-28] Accordingly, the Letter of Intent made clear that the parties contemplated an asset sale, as the parties agreed that "Corinthian shall not assume or be responsible for any trade accounts payable or accrued liabilities." [Addendum 42] The parties also agreed that "Corinthian and SCI will work

[1] Cites to A refer to the Appendix. For example, A59 refers to Appendix, page 59, and A59/17:11-23 refers to deposition page 17, lines 11 through 23 on page 59 of the Appendix.

together to structure the transaction to efficiently adhere to state funeral and cemetery regulations." [Addendum 43]

Both sides to the sales transactions unequivocally agree that the sellers (SCI and then Corinthian) intended to sell and transfer and the buyers (Corinthian and then Washburn) intended to buy and receive ***only*** the Cemeteries for an agreed total price of $1,000,000. [Addendum 46/¶5, Addendum 47/5:8-20, Addendum 51/46:6-8, Addendum 55/¶3, A54/13:7-8, A190/48:21-23, A227/48:4-9] As noted, the parties had originally planned an asset sale, but they subsequently learned that for the buyers to operate the Cemeteries as for-profit cemeteries, as Crystal Lake had done, the sale of the Cemeteries had to be structured as a sale of Crystal Lake's stock. [Addendum 45/¶2, A44-45/5:8-6:5 ("forced" into stock sale), A55-56/14:10-28, A209/164-9, A288/15:23-16:10] This method of conveyance had to be used because Minnesota law would have required the Cemeteries to be non-profit unless they continued to be operated by Crystal Lake. [*Id.*, A184/24:2-13, Minn. Stat. § 306.88, subd. 1] Accordingly, the parties used a stock sale as the method to convey the Cemeteries for a price of $1,000,000, but nevertheless, they elected to treat the sale as an asset sale for tax purposes. [*Id.*; Addendum 45/¶2, Addendum 46/¶3] Thus, the method of the sales conveyance was solely for the benefit and convenience of the ultimate buyers, Washburn, which now seeks to employ that method as a mechanism to enrich itself beyond the intent of the deal.

SCI and Corinthian entered into written contracts to finalize their bargained-for purchase, sale, and transfer of the Cemeteries for $1,000,000. [A81-173] Although

structured as a stock sale, the parties' written documents show the sole and intended benefit of the bargain was only the Cemeteries:

- The Agreement lists only the Cemeteries and no other real property. [A81] The Agreement expressly granted SCI the right to remove all unencumbered cash, every computer, all computer software and related information, and all assets not used in the operation of the Cemeteries. [A94]

- The Agreement requires attachment of a schedule of "all real property" [A88], and only the Cemeteries were listed as Real Property in the attached schedules. [A122-125/Dawn Valley, A136-140/Crystal Lake, A156-159/Glen Haven]

- The Agreement requires the "income and expense statements for each business location making up the Business" of Crystal Lake to be attached [A86], and only the income and expense statements for the Cemeteries were attached. [A113/Dawn Valley, 117/Crystal Lake, and 118/Glen Haven]

- The Agreement requires schedules of all equipment, machinery, furniture, fixtures, and motor vehicles "owned or leased" by Crystal Lake to be attached [A88], and only schedules for the Cemeteries were attached, with the minute itemization of every mop, wastebasket, and extension cord. [A129-135/Dawn Valley, A145-155/Crystal Lake, A164-173/Glen Haven]

In sum, the Agreement specifically only identifies and repeatedly references the Cemeteries and their qualities, right down to paper clips. Yet it ***never*** identifies or references the two vacant lots that are at issue in this case.

The same day that SCI sold to Corinthian, Corinthian resold to Washburn for $1,000,000 in a virtually identical set of agreements. [A231-283] The SCI/Corinthian Agreement provided that it "shall inure to the benefit and be binding on" all successors, and in the agreement between Corinthian and Washburn, Corinthian assigned its rights under the SCI/Corinthian Agreement to Washburn. [A110, A193/61:16-25, A254-255]

Thus, Washburn stepped into the shoes of Corinthian as it relates to SCI. [*Id.*, A134/61:16-25]

Unknown at the time to anyone involved in negotiating the sale, purchase, and transfer of the Cemeteries, Crystal Lake also owned two vacant lots (the "Lots") in Colorado and Burnsville worth an additional $2,000,000. [A61/18:27-19/2 (Corinthian), A289/20:2-9 (SCI), Addendum 54/Interrogatory Response 9 (Washburn), Addendum 56/¶6; *see also* Statement of Facts Section III] At the time of the transactions, neither SCI, Corinthian, nor Washburn knew that the Lots were titled in Crystal Lake's name and thus were accidentally part of the stock sale. [*Id.*]

II. After the sale, the parties acted in fashion consistent in all respects with the real intention concerning bargained for the sale, purchase, and transfer of only the Cemeteries and not the Lots.

After the sale, SCI continued to exhibit ownership over the Lots, paying real estate taxes on and contracting to sell the Colorado lot and listing the Burnsville lot for sale. [Addendum 56/¶¶4-5]

After the sale, Washburn operated the Cemeteries only – Washburn never exhibited any indicia of ownership over the Lots, never paying taxes on, maintaining, or even setting foot on either of the Lots. [Addendum 51/47:19-24, A226-227/47:19-483; 220] Indeed, Washburn only learned of the Lots in 2008 – it became aware of the Colorado lot when a prospective buyer approached Washburn about purchasing it and the Burnsville lot when SCI sued. [Addendum 49/18:17-19-24, Addendum 54/Interrogatory Response 9]

III. The parties only intended to sell, purchase, and transfer the Cemeteries worth $1,000,000; they never intended to sell, purchase, and transfer the Lots worth an additional $2,000,000.

As set forth above, the detailed written sales documents specifically identify and reference only the Cemeteries. The sale, purchase and transfer of ***only the Cemeteries*** – and not the stock or the Lots – were ***the "real intention" of the parties***. The stock was not the object of the parties' intention but rather merely a vehicle used to effect the intent to sell, purchase, and transfer the Cemeteries while still complying with Minnesota funerary laws. The written sales documents never identify or reference the Lots because it was never the "real intention" of the parties to sell, purchase, and transfer them.

A. SCI intended to sell and transfer only the Cemeteries and not the Lots.

As made clear by the uncontroverted testimony of Christopher Cruger, SCI's then Vice President of Business Development and a person intimately involved in the 2005 sales negotiations, SCI intended to sell and transfer only the Cemeteries and not the Lots. [A286/8-10-12, A288/14:19-23, A289/20:2-6, A290/22:3-24, 292/31:7-16] SCI was unaware that by effecting the parties' bargained-for sale and purchase of the Cemeteries through a stock transaction, the Lots inadvertently would be transferred as well. [*Id.*]

B. Corinthian intended to buy and receive and then resell and transfer only the Cemeteries and not the Lots.

Likewise, Corinthian only intended to buy and receive and then resell and transfer the Cemeteries and never intended to buy and receive the Lots from SCI and never intended to sell and transfer them to Washburn. [Addendum 46/¶5, Addendum 47/5:1-18, Addendum 48/22:20-23:12, A68/24:7-22] Indeed, Corinthian "did not know" about

the Lots and thus never had any "intent to transfer" them to Washburn. [Addendum 46/¶5, Addendum 47/5:1-18, A68/24:7-22]

C. Washburn intended to buy and receive only the Cemeteries and not the Lots.

The record also unequivocally establishes that Washburn intended to buy and receive only the Cemeteries. Indeed, when entering into the sales transaction, Washburn never knew of, let alone relied on, Crystal Lake's ownership of the Lots. [Addendum 54/Interrogatory Response 9, A227/48:4-9] In a key concession, Washburn acknowledged that "SCI, Corinthian, and Washburn" "were all under the belief that the major assets" in the sale were only the Cemeteries. [A227/18-22]

Washburn's repeated admissions demonstrate that the parties only bargained for the Cemeteries and not the Lots, that the Cemeteries were the true object of the sales, and that the stock was merely the method of conveyance and not the object of the deal:

- When asked if Washburn knew of the Lots in 2005, Washburn unequivocally responded, ***"No, certainly did not, never heard of it."*** [Addendum 49/18:17-19:5 (emphasis added)] Otherwise stated, Washburn unequivocally admitted that ***"We had no idea at the time"*** of the sale about the Lots. [Addendum 50/35:11-21 (emphasis added)]

- When asked if Washburn ever imagined in its "wildest dreams" that, Crystal Lake owned additional lots worth $2,000,000 when Washburn entered into the purchase, Washburn conceded it ***"had no idea."*** [Addendum 51/44:25-45:4 (emphasis added)]

- When Washburn learned of the Lots in 2008, it was ***"very much surprised."*** [Addendum 49/19:10-23 (emphasis added)]

- When asked whether anyone intended the Lots to be part of the sales transaction when the Cemeteries were sold,

Washburn conceded, ***"Not to my knowledge."*** [Addendum 51/46:4-8 (emphasis added)]

- When asked whether the parties had any knowledge that the Lots were part of the written agreements, Washburn admitted, ***"Not that I know of."*** [A196/74:3-7 (emphasis added)]

- When asked to admit that the parties never intended to transfer the Lots in the written agreements, Washburn acknowledged, ***"Since [the parties] didn't know about it, I guess that would be true."*** [A196/74:8-13 (emphasis added)]

- When asked about the purchase price and whether the amount Washburn paid for the Cemeteries took account of the Lots, Washburn readily admitted not knowing of the Lots, divulged that the Lots ***"had nothing to do with"*** the amount it paid for Crystal Lake, and conceded that it ***"didn't pay anything"*** for the Lots. [Addendum 50/35:16-19, Addendum 52/58:21-23 (emphasis added)]

IV. One million dollars was a fair price for the Cemeteries, and if title to the Lots is returned to SCI, Washburn will still have received the very benefit of its bargain.

Washburn admits that "at the time [$1,000,000] was a fair value" for the Cemeteries. [A222/31:22-22] The Cemeteries are valuable to Washburn because of their proximity to Washburn's existing funeral homes, and Washburn admits that it has realized the very benefits of owning the Cemeteries that it had anticipated at the time of its purchase from Corinthian. [A221/24:11-19, A199/87:10-17] As set forth above, Washburn concedes that, in consummating the deal, it did not know about and thus did not consider the Lots and never paid anything for them. It is undisputed that the Lots ***alone*** are worth twice the value of what Washburn paid for the Cemeteries. [*See e.g.*, Addendum 51/44:17-24] Notably, in a key and inescapable admission relating directly to the granting of equitable relief, Washburn admits that **if the Court grants Appellants**

relief concerning the Lots, Washburn would still have exactly what it bargained for in 2005 – the Cemeteries that were the true and only object of the parties' original bargain. [Addendum 52-53/59:14-60;13]

V. SCI sues for, *inter alia*, reformation and rescission.

On June 9, 2008, Appellants brought suit in Dakota County State Court seeking, *inter alia*, reformation and rescission. [A1-19, A27-35] Respondents filed a Rule 12 motion to dismiss the Complaint. [A20-21] The district court denied Respondents' motion to dismiss. [Addendum 36-41] In indicating that court will need to determine "what the real intentions of the parties were at the time the agreement was made," Judge Messerich noted that if Plaintiffs/Appellants' allegations "that none of the parties were aware that the vacant land was owned by Crystal Lake" are true, equitable relief of reformation or rescission could be granted. [Addendum 40-41]

Following the district court's ruling, Respondents answered denying liability. [A22-24] Thereafter, the parties conducted discovery. Both sides then moved for summary judgment. [A36-39] In an Order and Judgment dated April 2, 2009, the district court reluctantly entered summary judgment for Respondents. [Addendum 24-35] Yet the court expressly recognized that failing to reform the agreement "is inequitable" and gives Washburn "a windfall." [Addendum 33] Erroneously believing Minnesota law prohibited reformation because the parties' deal was done through stock, the district court begged for appellate guidance, stating that "[i]f another standard applies to the reformation of a stock purchase agreement, then it is the role of an appellate court to announce such a rule." [Addendum 32] The district court also mistakenly believed this

Court's decision in *Costello v. Sykes,* 143 Minn. 109, 172 N.W. 907 (1919) precluded rescission. [Addendum 33]

On May 26, 2009, Appellants SCI and Corinthian appealed the district court's Order and Judgment. [A301] In an opinion filed March 16, 2010, the court of appeals' majority (Judges Larkin and Wright) affirmed the district court under improperly deferential standards of review, and held that the remedies of rescission and reformation are categorically unavailable. [Addendum 1-17] Judge Worke dissented and would have remanded for an entry of summary judgment for Appellants SCI and Corinthian. [Addendum 18-23, specifically Addendum 2-23] As Judge Worke correctly concluded, "[a] court should not abstain from applying mutual-mistake analysis simply because the underlying transaction was for corporate stock rather than another kind of asset." [Addendum 22]

On April 14, 2010, Appellants SCI and Corinthian sought further review in this Court, and by Order dated May 26, 2010, this Court granted Appellants' petition. [A310]

SUMMARY INTRODUCTION

This appeal presents this Court with the opportunity to clarify or overrule *Costello* and instead adopt a rule that effects the parties' undisputed contractual intent, thereby promoting justice and bringing Minnesota law into conformity with basic principles of equity. The relevant facts are dispositive, and they are uncontroverted. It is undisputed that neither the sellers nor the buyers intended to convey the Lots. Indeed, at the time of contracting, no one handling the negotiations for any party knew about the Lots, which were worth twice as much as the agreed consideration for the Cemeteries that were the

actual, intended object of the transaction. To be sure, the contract mistakenly failed to memorialize that intent. But the equitable doctrines of reformation and rescission exist precisely to correct such mistakes and effect what the parties indisputably intended to accomplish. The district court itself recognized that if reformation is denied in this case, "the result is inequitable." [Addendum 32] That is the very opposite of the equity that the doctrines of reformation and rescission, like all equitable doctrines, exist to achieve.

Compounding its error by failing to apply the requisite *de novo* standard of review, the court of appeals mistakenly held that these doctrines are unavailable as a matter of law, solely because the parties elected to effect their bargain through a stock rather than asset sale. Overreading this Court's narrow decision in *Costello*, the majority held that a party to a stock sale, as a matter of law, can ***never*** achieve reformation of the agreement to reflect the parties' actual, undisputed intent, because the terms of the agreement providing for the conveyance of stock will always trump the parties' actual intent as to the scope of the transaction. *Costello* did not address any question of reformation. And the court of appeals' holding removes equity from the equitable doctrine of reformation. The doctrine's premise is that the parties' agreement has failed to reflect their actual intent. If the stringent requirements for the doctrine's application are satisfied – as they were through the undisputed testimony in this case, equity should not be withheld simply because the mistaken agreement was structured as a sale of stock.

Equitable principles are also frustrated when the rescission inquiry ends simply because the parties used stock as the conveyance means. Rescission requires an analysis of the actual intended underlying bargain, *i.e.*, the true object of the parties' transaction

(here, only Cemeteries and no more). Where, as here, the parties had a bilateral erroneous assumption and/or lacked mutual assent to convey assets, the Court should rescind the contract, even if it involved the sale of stock. Here, both the sellers and the buyers shared a fundamental but erroneous assumption that only the Cemeteries were being sold, purchased, and transferred, and they lacked mutual assent to sell, buy, and transfer the Lots. Accordingly, as an alternative to reformation, rescission is also available on the grounds of mutual mistake and lack of mutual assent.

When at the time of contracting, the parties share a fundamental but erroneous assumption about their contracts that has a material effect on the agreed exchange of performances, the parties' true contractual intention should be effected by either reformation or rescission. The court of appeals erred by holding that these principles do not apply simply because that intent was mistakenly effected through a sale of stock. That error must be corrected now.

STANDARD OF REVIEW

Summary judgment is mandated "where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (citing Minn. R. Civ. P. 56.03). On appeal from summary judgment, this Court must determine whether genuine issues of material fact exist and whether the district court erred in its application of the law. *FinAg, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579, 584 (Minn. 2006); *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990); *Hunt v. IBM Mid America Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986). Additionally, this Court conducts a de novo review of

questions of law. *See e.g., FinAg*, 720 N.W.2d at 584 (appellate court conducts a *de novo* review of questions of law).

LEGAL ARGUMENT

I. *De novo* review is required.

As just noted, on appeal from summary judgment, an appellate court conducts *de novo* review. *See e.g., FinAg,* 720 N.W.2d at 584 (appellate court conducts a *de novo* review of questions of law). To Appellants' knowledge, never has this Court enunciated a standard other then *de novo* review of a grant of summary judgment. Nor would a different standard be appropriate given that appellate courts concern themselves with the application of law, doctrinal coherence, and the economy of judicial administration, while district courts handle the trial of facts and grant summary judgment only to speed the administration of justice when there is no genuine issue of material fact.

A. *De Novo* Review of Reformation

Despite the clear and long-standing precedent requiring *de novo* review of summary judgment, the court of appeals applied a less strict "manifestly-contrary-to-the-evidence" standard to the reformation question, misapprehending *Golden Valley Shopping Ctr., Inc. v. Super Valu Realty, Inc.*, 256 Minn. 324, 329, 98 N.W.2d 55, 58 (1959). The standard enunciated in *Golden Valley* is inapposite. That case involved an appeal from a trial with disputed facts, with this Court holding that "[t]he degree of certainty essential to support a finding of reformation ordinarily rests in the judgment of the ***trier of fact***, and the latter's determination therein will not be disturbed on appeal unless it is manifestly contrary to the evidence." *Id.* at 329, 98 N.W.2d at 58 (citing

Kiges v. City of St. Paul, 240 Minn. 522, 62 N.W.2d 363 (1953)) (emphasis added). The manifestly-contrary-to-the-evidence standard in *Golden Valley* emanated from *Kiges*, 240 Minn. 522, 62 N.W.2d 363, where the trial court had likewise found the facts. *See Kiges*, 240 Minn. at 539, 62 N.W.2d at 374 ("When an action is ***tried by a court*** without a jury, its findings of fact are entitled to the same weight as the verdict of a jury and will not be reversed on appeal unless they are manifestly contrary to the evidence") (citation omitted) (emphasis added). Other decisions of this Court demonstrate that where there is no material factual dispute, the review on appeal even from a trial is *de novo*. *See Do v. American Family Mut. Ins. Co.,* 779 N.W.2d 853, 856 (Minn. 2010) (citation omitted) (*de novo* review of application of law in the absence of a factual dispute following trial); *American Nat'l Gen. Ins. Co. v. Solum,* 641 N.W.2d 891, 895 (Minn. 2002) (citation omitted) (*de novo* review of interpretation of case law, after trial where no dispute of material facts); *Dean v. American Family Mut. Ins. Co.,* 535 N.W.2d 342, 343 (Minn. 1995) (citation omitted) (where facts are undisputed following trial, *de novo* review of application of law).

Here, there was no factual dispute and no trial. This appeal is from an Order and Judgment following the parties' Rule 56 motions. As set forth above, the manifestly-contrary-to-the-evidence standard does not apply in a summary judgment context; this Court's long-standing *de novo* standard of review does. In this case, the district court held that, despite the parties' true and undisputed intent, reformation and rescission are not available ***as a matter of law*** because the parties effected their intended bargain through a stock sale. *De novo* review must apply to this legal determination. *See e.g.*,

Nguyen v. State Farm Mut. Auto Ins. Co., 558 N.W.2d 487, 490-91 (Minn. 1997) (where this Court conducted an independent review of the trial court's determination that, as a matter of law, it lacked discretion to vacate a judgment, but noting that it would have exercised such discretion had the law permitted it to do so) and *In re Estate of Slingerland*, 196 Minn. 354, 357, 265 N.W. 21, 23 (1936) ("We are not in a position to judge what the lower court would have done had it known it could have exercised its discretionary powers"). In short, the reformation issue requires *de novo* review.

B. *De Novo* Review of Rescission

Just as it did on the question of reformation, the court of appeals misapplied a less strict standard of review to the rescission issue. Misplacing reliance upon *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979), the court of appeals noted that the granting of equitable relief is within the sound discretion of the court, and it therefore applied an abuse-of-discretion standard rather than the requisite *de novo* review. *Nadeau* is inapplicable, however, because this Court's application of an abuse-of-discretion standard followed a trial and related to the trial court's discretionary grant of a new trial. *Nadeau*'s standard of review emanated from *Wild v. Rarig*, 302 Minn. 419, 433, 234 N.W.2d 775 (1975), *appeal dismissed*, 424 U.S. 902 (1976), which involved the trial court's decision not to exercise its discretion to grant a new trial. *See Wild*, 302 Minn. at 433, 234 N.W.2d at 785-86 (granting of a new trial is wholly discretionary with trial court and will not be reversed absent an abuse of discretion).

Again, there was no trial. This appeal emanates from a grant of summary judgment and involves questions of law, requiring a *de novo* review. *See e.g.*, *FinAg,* 720 N.W.2d at 584 (appellate court conducts a *de novo* review of questions of law).

C. Conclusion: *De Novo* Review

The court of appeals erred in its enunciation of the standards of review for both reformation and rescission in the context of a grant of summary judgment. *De novo* review applies to both, and this Court should so state and conduct a *de novo* review of both core contract principles.

II. Minnesota law permits reformation based on mutual mistake even if the parties' bargained-for sales deal is effected through the sale of stock.

Here, the elements of reformation are satisfied, and the contract should be reformed to express the parties' true intent. Reformation is an appropriate remedy where the clear and convincing evidence shows that: a) the parties in fact had a "valid agreement sufficiently expressing" their "real intention;" b) the written contact "failed to express such true intention;" and c) "the failure was due to mutual mistake[.]" *Theisen's, Inc. v. Red Owl Stores, Inc.*, 309 Minn. 60, 65-66, 243 N.W.2d 145, 148-49 (1976) (citations omitted) (elements specified). "Reformation may be granted not only where the language used in the instrument is not such as was intended, but also where both parties are in error in respect to the thing to which such language applies." *Pettyjohn v. Bowler*, 219 Minn. 55, 58, 17 N.W.2d 82, 84 (1944) (citation omitted); *see also Haley v. Sharon Twp. Mut. Fire Ins. Co.*, 147 Minn. 190, 193, 179 N.W. 895, 896 (1920) (citation

omitted) (reformation is proper where the parties are "mistaken as to some material fact which formed the consideration thereof or inducement thereto").

A. Undisputed Testimony Establishes That All Elements Required For Reformation Have Been Satisfied

Regarding the first reformation element, it is undisputed that the parties had a "valid agreement sufficiently expressing" their "real intention" to buy, sell, and transfer ***only*** the Cemeteries. All the parties agree that this deal was about the Cemeteries, which they had an intent to sell, buy, and transfer, and that no one negotiating for the parties had any awareness of the Lots at the time of contracting, let alone an intent that the Lots would be part of the deal. [See Facts Section V] The Letter of Intent identifies the object of the sales transaction and expressly lists the Cemeteries that Corinthian desired to purchase from SCI.[2] Furthermore, all of the sales documents are replete with specific references only to the Cemeteries, from the income and expense statements, to the property schedules, and even to every mop, wastebasket, and extension cord. In fact, Washburn itself concedes that the parties to the deal, "SCI, Corinthian, and Washburn," "were all under the belief that the major assets" in the sale were ***only*** the Cemeteries. Given that Washburn admits that if the Court returned the Lots to Appellants, Washburn

[2] In addition to the Cemeteries, the Letter of Intent also lists the Werness Brothers Funeral Home, the Mueller Parkway Chapel, and the Lake Mortuary, other assets that Corinthian desired to buy from SCI. [Addendum 42, A47-50/8:7-9:30] These additionally listed properties are not at issue here. However, the fact that the Letter of Intent identifies every single piece of property that SCI intended to sell and transfer and that Corinthian intended to buy and receive further buttresses Appellants' position that the parties' real intent did not include the sale, purchase, and transfer of the Lots. The Lots are not listed in the Letter of Intent.

would be in the same position it thought it bargained for in the 2005 sales transaction, no reasonable person could conclude other than the parties' "real intention" was to sell, buy, and transfer ***only*** the Cemeteries. SCI and Corinthian never set out to sell and buy stock, respectively. Likewise, Corinthian and Washburn never set out to sell and buy stock, respectively. The use of stock as the mere method of conveyance only arose later in the sales process, as a convenience structure to enable the buyers to operate the Cemeteries for profit.

Regarding the second reformation element, it is clear that the parties' written contract failed to express this "real intention" and instead inadvertently transferred more, *i.e.*, the Cemeteries ***and the Lots***. That the written agreements designed to effect the parties' "real intention" were flawed is demonstrated by the admissions of Washburn, when its representative testified that: it never knew of the Lots in 2005; at the time of the sale, no one intended the Lots to be part of the transaction; the Lots had nothing to do with the established price for the Cemeteries and Washburn did not pay anything for the Lots; and none of the parties intended to transfer the Lots in the written agreements. With these admissions, no reasonable person could conclude other than that the written agreements "failed" to express the parties' "true intention."

Finally, with respect to the third reformation element, the failure of the written agreements to express the parties' real intention was due to a mutual mistake of the parties. The parties were mutually mistaken that the Lots were part of the written sales contracts, rather than having been excluded, as none of the people involved in negotiating the deal and drafting the written contracts knew, bargained for, or intended the Lots to be

sold, bought, and transferred. Neither SCI, Corinthian, nor Washburn was aware of the Lots at the time of the sale and none of them intended the Lots to be part of the transaction. [*See* Statement of Facts Section III] In fact, Washburn admits that it did not know about the Lots or Crystal Lake's ownership of them at the time of the sales transaction; that in the Cemeteries transaction, no one intended to sell the Lots; that Washburn did not pay anything for the Lots; and that Washburn was "very much surprised" when it learned about the Lots in 2008, three years after the sales transaction. As the district court acknowledged, "no-one involved in the 2005 transactions and sale of Crystal Lake knew that the [Lots] had been titled in the name of Crystal Lake." [Addendum 28] This is mutual mistake. *See Pettyjohn*, 219 Minn. at 58, 17 N.W.2d at 84 ("Reformation may be granted not only where the language use in the instrument is not such as was intended, but also where both parties are in error in respect to the thing to which such language applies") (citation omitted); *see also Haley v. Sharon Township Mut. Fire Ins. Co.*, 147 Minn. 190, 193, 179 N.W. 895, 897 (1920) (reformation is proper where the parties are "mistaken as to some material fact which formed the consideration thereof or inducement thereto").

In short, the clear and convincing evidence establishes the elements of reformation. Reformation puts the parties in the exact position they thought they were in at the time of contracting, whereas denial of reformation works a grave injustice to SCI and gives Washburn an absurd windfall of an additional $2,000,000 that was never part of its bargain. Applying *de novo* review, this Court should therefore direct the trial court

to reform the sales agreements to reflect the parties' "true intention" to transfer only the Cemeteries and not the Lots.

B. Reformation Is Not Categorically Unavailable Merely Because The Parties' Mistaken Agreement Was Structured As a Sale of Stock

The court of appeals misguidedly focused on the fact that the parties effected the sales transactions through a stock sale. It misapprehended this Court's *Costello* decision, essentially holding that the remedy of reformation is unavailable in any stock sale. According to the majority, because "the subject matter of the parties' stock-sale agreements was SCI's stock in Crystal Lake, not the [Lots]," the agreements "evidence a meeting of the minds as to the essential terms of the stock sale," even though "no party expected or was aware that the two vacant parcels would be transferred as part of the sale." [Addendum 12] This Court has never ruled on this precise issue, and such a result would be inconsistent with this Court's prior reformation decisions. Further, this Court's 1919 *Costello* decision dealt only with rescission and not reformation, and applied to the reformation issue here, *Costello* is inapposite. *Costello*, 143 Minn. at 111, 172 N.W. at 908 ("the sole question presented is whether the mistake . . . gives rise to a right to rescind").

As set forth above, the Court's precedents on reformation establish that the remedy is mandated here because a) the real object and true intention of the parties was to buy, sell, and transfer only the Cemeteries, and stock was nothing more than the mere means of conveyance; b) the written agreements fail to reflect the true intention to sell, buy, and transfer only the Cemeteries; and c) the failure was a result of the parties'

mutual mistake as no one negotiating the deal and drafting the written contract knew, bargained for, and intended the Lots to be sold, bought, and transferred.

The court of appeals majority's misguided focus on the singular fact that the sales transactions were effected through stock flies in the face of this Court's longstanding pronouncement that reformation requires an analysis of the parties' true intention. The evidence establishes that the parties' real intention was not simply to transfer stock, regardless of whether that transfer carried with it ownership of unknown parcels worth more than twice the consideration paid for the assets that were the actual object of the parties' deal. Quite the contrary, the real object of these sales transactions were the Cemeteries. Stock was simply the only way to effect the deal and enable the Cemeteries to continue to be operated for a profit. The court of appeals' majority's twisted logic that the Lots were not excluded from the sale and thus are part of the sale begs the question, especially since parties cannot exclude that which they do not know exists. *See e.g., Standard Brands, Inc. v. Millard*, 273 F.2d 882, 883-85 (7th Cir. 1960) (where neither assignee nor assignor of business assets knew of a potential legal claim against a third party, such legal claim was never assigned). Moreover, when all parties agree that they never intended to sell, buy, and transfer the Lots, the absence of exclusion of the Lots proves the real object of the sales transactions – the parties' sole focus was the sale, purchase, and transfer of the Cemeteries. Nothing else was in their minds, and therefore there was no "meeting of the minds" as to any deal that would include the unknown Lots.

In a perfect world, every contract would state the parties' real intentions. In a perfect world, when drafting the written contract, SCI as the initial seller would have

realized that the Lots were titled in Crystal Lake's name and would have taken the necessary steps to state expressly that only the Cemeteries were being sold in the stock sale. Corinthian would have done so, as well. But this is not a perfect world, and long-standing contract law has recognized that reality with the creation of equitable remedies such as reformation and rescission to correct the parties' mistakes. The court of appeals' majority opinion departs from these textbook contract law tenets of reformation and rescission and frustrates equitable relief. The majority's belief that "[i]gnoring the stock-sale form" of the written agreements "would excuse the seller from exercising due diligence to identify the corporate assets that will transfer with the sale" is likewise flawed and contrary to textbook contract law principles. In this imperfect world, as the *Restatement (Second) of Contracts § 157* states, a "mistaken party's fault in failing to know or discover facts before making the contract" will not bar reformation unless the "fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." The record contains no evidence of any "failure to act in good faith," and Washburn has never asserted any.

As the dissent correctly explained, because both sides understood that their bargain covered only the Cemeteries, they made a mutual mistake and "did not express their true intent when they reduced their agreement to transfer the three cemeteries into writing in the stock sale agreements." [Addendum 20] As a result, "[r]eforming the stock sale agreements would impose no injustice upon respondent [Washburn], who was likewise unaware of the existence of the additional lots and neither bargained for nor paid for these properties." [Addendum 20-21] "A court should not abstain from applying

mutual-mistake analysis simply because the underlying transaction was for corporate stock rather than another kind of asset." [A22] The very premise of the doctrine of reformation is that the parties' written agreement has failed to reflect their true intent, and that premise applies equally whether the terms of the agreement mistakenly provide for sale of stock or a sale of something else. If it had turned out that Crystal Lake did not have formal title to the Cemeteries, Washburn would surely have demanded reformation to prevent SCI from achieving an unintended windfall, even though the agreement was formally structured as a sale of stock. The same is true here, where it turned out that Crystal Lake had title to additional valuable properties that no party intended to be part of the deal.

Allowing reformation here would also bring Minnesota's law on reformation into conformity with basic contract equitable relief principles in other jurisdictions.[3] *See e.g., Restatement (Second) of Contracts § 155* (reformation is available where an agreement "in whole or in part fails to express" the parties' true agreement "because of a mutual mistake of both parties as to the . . . effect of the writing"); *Amato v. Amato's Supper Club, Inc.*, 269 Or. 520, 525 P.2d 1023, 1025 (1974) (affirming reformation of a stock sale agreement due to mutual mistake where seller failed to except notes the company

[3] Below, in arguing against reformation, Washburn mistakenly relied on this Court's decisions in *Costello* and *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730 (Minn. 1980) and several decisions of the court of appeals. As set forth above, *Costello* is not a reformation case. *Nichols* is likewise inapposite because there was no mutual mistake, as only one party was mistaken as to the value of the mortgage. *Nichols*, 294 N.W. at 734. Moreover, court of appeals decisions lack precedential value in this Court. *See, e.g., Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 245 (2005) (this Court is not bound by the court of appeals' interpretations in previous cases).

owed to seller); *Kern v. NCD Indus., Inc.*, 316 A.2d 576, 583 (Del. Ch. 1973) (reformation of stock sale to conform to parties' intent that full payment for stock was a prerequisite to buyer's assumption of control of the company); *Harris v. Baird*, 546 So.2d 497, 501 (La. App. 1989) (affirming reformation of stock sale to correct parties' mutual mistake in failing to list an outstanding service agreement); *Vogel v. Kirshner*, 139 Or. 474, 481, 10 P.2d 1053, 1056 (1932) (affirming reformation of a stock sale where the parties were mutually mistaken as to the agreement's inclusion of liability).

In sum, the facts here compel reformation, and reformation is the just and equitable result. As Washburn itself admits, if this Court reforms the parties' agreements, Washburn would still have exactly what it bargained for in 2005 – the Cemeteries that were the true and only object of the parties' original bargain. Nor would reformation foster any deluge of claims by dissatisfied buyers or sellers, just as there has been no such deluge in other jurisdictions. The requirements of the doctrine are strict and must be satisfied, as they were here, by clear and convincing evidence. Allowing reformation in this case would simply confirm that this equitable doctrine applies regardless of whether an agreement involves the sale of stock. By contrast, denying reformation would award Washburn a $2,000,000 windfall that it neither bargained for nor deserves.

III. Minnesota law permits rescission based on mutual mistake and/or lack of mutual assent, and the rescission analysis should not end simply because the parties effected their bargained-for sales deal through the sale of stock.

Although reformation is proper for the reasons set forth above, in the alternative, rescission is also appropriate here. Two bases exist for rescission under Minnesota law:

rescission due to mutual mistake or rescission due to lack of mutual assent. Despite these grounds for rescission, the court of appeals denied rescission on either ground, erroneously reading the no-rescission rule in *Costello* to cover any sales transaction where the sale is effected through the sale of stock -- "[u]nder *Costello*, this is where our analysis must end." [Addendum 14] As set forth below, that is not the law, and if the Court does not reform the parties' agreements, then rescission is appropriate on the facts here.

A. Rescission due to Mutual Mistake

Where a "mutual mistake" exists concerning a material fact, the parties to a contract may avoid the contract. *Winter v. Skoglund*, 404 N.W.2d 786, 793 (Minn. 1987) (citations omitted) (contract may be avoided on the grounds of mutual mistake if the party seeking to avoid the contract did not assume the risk of the mistake). "Mistake" means "a belief that is not in accord with the facts." *Restatement (Second) of Contracts § 151* (1981) (definition of mistake). A mistake of a material fact includes one that goes "to the very nature of" the deal. *See e.g., Gartner v. Eikill*, 319 N.W.2d 397, 399 (Minn. 1982) (rescinding the contract for the conveyance of real property due to mutual mistake regarding zoning restrictions).

As the *Restatement (Second) of Contracts § 152 (1)*, cited by this Court in both *Winter*, 404 N.W.2d at 793, and *Gartner*, 319 N.W.2d at 398, makes clear,

> [w]here a ***mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made*** has a material effect on the agreed exchange of performances, the contract is voidable by the adversely

> affected party unless [that party] bears the risk of the mistake under the rules stated in § 154.

Id. (emphasis added).

Rescission is not precluded merely because a party could have discovered the mistake. *See e.g., Gartner*, 319 N.W.2d at 399 (citations omitted) (in a case where buyer could have checked the zoning restrictions and learned property was not "available for development," this Court held rescission was available because mistake "was not of the *monetary* value of the land, but 'went to the very nature' of the property"); *see also, Restatement (Second) of Contracts § 157, cmt. a* (1981) ("mere fact that a mistaken party could have avoided the mistake by the exercise of reasonable care does not preclude avoidance").

In this case, all of the parties made a mutual mistake going "to the very nature" of their sales deal. All of them understood that ***only*** the Cemeteries were part of the sales transaction and ***not*** the Lots as well. The parties were all mutually mistaken at the time of contracting "as to basic assumption on which the contract was made" and that mutual mistake "has a material effect on the agreed exchange of performances." *See Restatement (Second) of Contracts § 152 (1)* (discussing mutual mistake at the time of contracting). Rather than transferring only the Cemeteries, the contract as written inadvertently transferred not only the Cemeteries, but also the Lots that alone were worth $2,000,000. Under these circumstances, rescission due to mutual mistake is appropriate.

Despite the compelling facts for rescission, both the court of appeals' majority and the district court refused Appellants' request for mutual-mistake rescission, relying on

this Court's 1919 *Costello* decision. The court of appeals' majority and the trial court read *Costello* as precluding rescission where the parties have structured the sale as a stock sale. [Addendum 14 (lack-of-mutual-assent rescission), Addendum 15 (mutual-mistake rescission), Addendum 32] *Costello* is a narrow decision with extremely limited applicability. There, the seller of a bank and the buyer agreed upon a value for the bank stock, and the Court declined to rescind the contract at the request of the buyer where the parties innocently misapprehended that value. *Costello*, 142 Minn. at 113, 114, 172 N.W. at 909.

Costello does not govern this case. Here, the Cemeteries were the true object of the sale, and the parties' mistake lay in their failure to exclude the unknown Lots from the transaction rather than in their valuation of the Cemeteries. The parties anticipated an asset sale, and only after it became known that an asset sale would not allow Corinthian and ultimately Washburn to operate the Cemeteries for profit did the method of conveyance change from an asset sale to a stock sale. Even then, the parties agreed to treat the sale as an asset sale for Internal Revenue Service purposes. Under these circumstances, no reasonable person would conclude that the benefit of the parties' bargain was the Crystal Lake stock, even if that stock carried with it ownership of additional parcels worth twice the consideration paid for the Cemeteries that were truly the object of the parties' bargain. There is no question of fact here and no dispute that neither SCI, Corinthian, nor Washburn expected to effect ***any*** transfer of property other than three functioning Cemeteries. If agreement is not reformed to reflect that intent,

then there has been a mutual mistake going to the very nature of the deal that mandates rescission.

Costello has no application here, where the mutual mistake affects the underlying substance of the transaction and goes to "the very root of the matter involved." *Costello* was premised on *Kennedy v. Panama, New Zealand and Australia Royal Mail Co.*, L.R. 2 Q.B. 580 (1867). *See Costello*, 142 Minn. at 111, 172 N.W. at 908 (discussing *Kennedy*). In denying rescission in *Costello*, this Court noted that in *Costello* as in *Kennedy*, "there was not such a complete difference in the substance between what was supposed to be and what was taken as would constitute a failure of consideration." *Id*, 142 Minn. at 111-12, 172 N.W. at 908. That is not the case here. The difference exists. The substance of what was supposed to be taken was the Cemeteries at a value of $1,000,000 and the substance of what was taken was the Cemeteries and the Lots worth $3,000,000, constituting an abject failure of consideration.

Reading the no-rescission rule in *Costello* to cover any stock sale, the court of appeals' majority rejected rescission on the grounds of mutual mistake, stating that under *Costello*, "the parties' mistake mutual mistake regarding the nature or extent of Crystal Lake's assets is not grounds for rescission." [Addendum 15] As the Supreme Court in a neighboring jurisdiction notes, *Costello* "need not be read quite that narrowly." *Clayburg v. Whitt*, 171 N.W.2d 623, 626 (Iowa 1969) (applying mutual mistake analysis where buyer contracted for 85% of the corporate stock and holding rescission was proper). As explained by Judge Worke in the court of appeals' dissent,

> [a]s the *Clayburg* court recognized, a distinction should be made between the sale of corporate stock and the sale of a closely-held corporation, even though the latter transaction necessarily involves the sale of stock. . . . ***Costello***, in which the appellant bought ten shares of a bank's outstanding stock, exemplifies the former situation, and ***is therefore not on point.***. . . . When the subject of a sale is a small portion of the outstanding stock in a business, the business's assets and liabilities contribute to the book value of the business, and hence the value of the stock. Relief on the ground of mutual mistake is not available when the mistake pertains merely to the value of the item sold. *Gartner*, 319 N.W.2d at 398-99.
>
> But when the business itself is the subject of the sale and, as here, the assets and liabilities are considered in striking the bargain, the business assets and liabilities go to the very nature of the business. *Clayburg*, 171 N.W.2d at 626-27 (ruling that, even where the purchaser contracted to buy 85 percent of the stock, questions about the existence of the corporate assets justified mutual-mistake analysis); *see also Gartner*, 319 N.W.2d at 399-400 (ruling in favor or rescission on the ground of mutual mistake when the mistake "went to the very nature" of the property) . . .

[Addendum 21-22 (certain citations omitted) (emphasis added)]

The dissent correctly notes that circumstances may make it appropriate to look "beyond the form of the asset transferred (corporate stock) to the substance of the transfer (corporate assets and liabilities) in deciding whether there was a mutual mistake that would justify . . . rescission." [Addendum 22, citing *Clayburg*, 171 N.W.2d at 626] As Judge Worke aptly recognized, "if form is always put over substance, any remedy available for mutual mistake would be placed out of the reach of those who would otherwise be entitled to it." [Addendum 22]

If *Costello* stands for the premise enunciated by the court of appeals' majority, it virtually eviscerates the concept of rescission whenever a stock sale is involved and

should be overruled. That premise would be inconsistent with and frustrate the long-standing contract law tenets governing equitable relief, which seek to effect the parties' intent. Just years after *Costello* was decided, a *Harvard Law Review* commentator specifically addressed the factual settings of *Costello* and other like decisions that focused on the "subject matter" and instead urged application of a "basic fact test." *See Notes, Rescission of a Contract for Mutual Mistake of Fact,* 35 Harv. L. Rev. 757, 761 (1921-1922) (providing a detailed analysis of the then different jurisdictional approaches in to rescission). [A312-316] In commenting on contrary results that courts had reached in cases including *Costello*, the commentator described the basic problem with a rigid application of any test (here, the stock-ends-the-inquiry analysis) and noted that

> [a]ll of these cases may, however, be explained on the basis fact test, viz., that "where the parties assumed a certain state of facts to exist, and contracted on the faith of that assumption, they should be relieved from their bargain if that assumption (which was made by them the fundamental basis of their agreement) was erroneous." . . . In all these intermediate cases the parties have received the thing for which they bargained. There is no question of identity of subject matter. The error goes clearly to a fact which may be called collateral, or extrinsic . . . but since that fact was taken by the parties as the fundamental basis of their agreement relief should be granted.

Id. (footnotes omitted) (emphasis added). [A316]

This "basic fact test" is essentially the test now set forth in the Restatement (Second) of Contracts § 152 (1).

> Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of

> performances, the contract is voidable by the adversely affected party unless [that party] bears the risk of the mistake under the rule stated in § 154.

Id.[4] Under this test, the inquiry into whether to grant equitable relief should turn on whether there is a fundamental but erroneous assumption at the time of contracting, and not on a blind application of a formulaic rule that elevates form over substance and holds the parties to an inequitable result that was never the intended outcome of their bargain.

B. Rescission due to Lack of Mutual Assent

It is axiomatic that "the formation of a sale contract requires the mutual assent of the parties engaging in the contract." *Hy-Vee Food Stores, Inc. v. Minn. Dep't of Health*, 705 N.W2d 181, 185 (Minn. 2005) (citations omitted). Indeed, "[a] contract requires a meeting of the minds regarding its essential elements." *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980). Rescission of a contract is an available equitable remedy. *See Beck v. Spindler*, 256 Minn. 565, 566, 99 N.W.2d 684, 685 (1959) (in reviewing trial verdict that rescinded a contract, the court noted that "[r]escission is an equitable remedy").

Here, there was only a meeting of the minds to sell, purchase, and transfer the Cemeteries, and there was no meeting of the minds to sell, purchase, and transfer the Lots. Rescission is an appropriate equitable remedy to rectify the lack of mutual assent.

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[4] Section 154 provides that a party will bear the risk of a mistake when it "is allocated to him by agreement of the parties," when he is aware at the time of contracting "that he has only limited knowledge with respect to facts to which the mistake relates but treats his limited knowledge as sufficient," or where "the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." None of these grounds apply here.

Although conceding that there was no mutual assent concerning the sale of the Lots, the court of appeals' majority rejected rescission because the sale was effected through a stock transaction. The result is that there is no equitable relief, regardless of the long-standing equitable tenets under contract law. That holding is erroneous. There was a meeting of the minds and mutual assent to sell, purchase, and transfer the Crystal Lake "stock" only to the extent that the stock represented the Cemeteries, and there was no meeting of the minds to sell, purchase, and transfer the Crystal Lake "stock" to the extent the stock represented the Cemeteries ***and*** the Lots. Thus, there was no enforceable contract relating to the Lots. *See e.g., Restatement (Second) of Contracts § 20, including the Illustrations* (governing the effect of a misunderstanding on mutual assent and demonstrating in the Illustrations that where both parties intend the same ship named Peerless, there is a contract but where neither party "knows or has reason to know that they mean different ships [both named Peerless], or if they both know or if they both have reason to know [they mean different ships], there is no contract").

Although from another jurisdiction, the case of *West Coast Airlines, Inc. v. Miner's Aircraft & Engine Serv., Inc.*, 66 Wash. 2d 513, 517-19, 403 P.2d 833 (1965) is instructive. In that case, the parties contracted to sell and purchase accumulated unusable scrap metal in the form of cans and their scrap metal contents. Unknown to either side, two cans held two aircraft engines that were not scrap metal. The Washington Supreme Court held that "[t]here was no meeting of the minds, no contract, and thus no sale of the engines." *Id.*, 66 Wash. 2d at 519, 403 P.2d at 837 (citations omitted) ("Unknown contents of the subject matter of a sale that are not essential to its existence or usefulness,

but which are merely deposited therein, and which are not within the contemplation of or intention of the contracting parties, do not pass by sale.").

Analogizing to the current situation, there was no meeting of the minds, no contract, and thus no sale regarding the Lots. The court of appeals' majority rejected this analogy, applying *Costello* (which was nothing more than a "mutual mistake" rescission case) to Appellants' claim for rescission due to "lack of mutual assent." The court of appeals' majority categorically declared rescission unavailable in a stock sale, when it opined that *Costello* prohibits an "examination of the 'contents' of a stock 'vessel.'" [Addendum 14] This makes no sense and it offends any notion of justice, particularly where, as here, the parties were focused solely on the assets of the Cemeteries and used stock merely as a conveyance method to assist the ultimate buyer, Washburn, to operate the Cemeteries for profit. Just as with "mutual mistake" analysis, the majority's application of *Costello* in this "lack of mutual assent" context elevates form over substance and consequently transfers Lots that were never part of the parties' bargain. Such a result violates the tenets of equitable relief. *Costello* does not apply, and if it does, it should be overruled or limited.

CONCLUSION

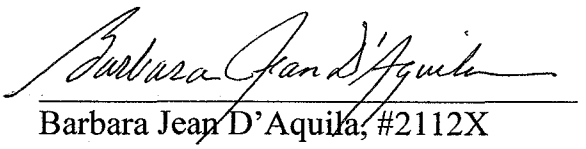
Now is the time to provide the very guidance the district court sought. Neither SCI, Corinthian, nor Washburn knew the Lots were part of the stock sale, SCI never intended to sell the Lots, Corinthian never intended to buy and then subsequently sell the Lots, and Washburn never intended to buy, never bargained for, and never paid for the Lots. The dissent was correct. Equity requires that the Lots be returned to SCI.

Reformation is necessary to effect the parties' true and undisputed intent to sell, buy, and transfer only the Cemeteries. In the alternative, rescission is appropriate to relieve the parties of their bilateral, erroneous assumption that only the Cemeteries were being sold, bought, and transferred or to rectify their lack of mutual assent to buy, sell, and transfer the Lots. This Court should therefore reverse the judgment below and remand with instructions that judgment be entered in favor of Appellants.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

Dated: June 25, 2010



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